THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Thomas W. Cooper, Retired Circuit Court Judge
Special Referee

Case No. 2008-CP-14-00354

Daniel Darby,	Appellant,
v.	
South Carolina Public Service Authority,	Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

DID THE TRIAL COURT CORRECTLY RULE THAT THE BOUNDARIES OF THE DARBY PROPERTY ARE AS SET FORTH IN THE TAW CAW PLAT AND NOT AS SET FORTH IN THE ELLIOTT SURVEY?

COUNTER-STATEMENT OF THE CASE

Respondent South Carolina Public Service Authority, also known as Santee Cooper, ("SCPSA") is an agency of the State of South Carolina. Appellant Dan Darby ("Darby") is an individual who owns a parcel of property ("Darby Property") located in Clarendon County. SCPSA asks the Court to affirm the decision of the lower court ruling that the Darby Property, first conveyed in 1949 by SCPSA to Darby's grandfather and predecessor in title and subsequently to Darby in 2007, consists of 3.8± acres, and that the correct legal description and property boundary of the Darby Property ultimately acquired by Darby is accurately depicted on the plat referenced in the 1949 deed.

This action was commenced by Darby's filing of a Complaint which sought Declaratory Judgment Regarding Real Estate on July 14, 2008, in the Court of Common Pleas for Clarendon County. Darby sought an Order declaring him to be the owner of the property described on Exhibit A to the Complaint and further declaring that Darby was entitled to an easement for ingress and egress across the lands of SCPSA. Exhibit A to the Complaint is a survey that was performed after Darby purchased the Darby Property. ("Elliott Survey," R. p. 298). It purports to determine that the Darby Property consists of 26.64 acres, rather than 4 acres as set forth in the deed by which Darby acquired the property. ("Darby Deed," R. pp. 226-229). The difference in acreage of the Darby Property between what is shown on the Darby Deed as conveyed to Darby and the Elliot Survey performed after the purchase and upon which Darby now bases his claim is approximately 22 acres.

SCPSA filed an Answer on August 20, 2008, asserting a general denial and numerous affirmative defenses. In particular, it alleged that the boundaries of the Darby Property had been established in a conveyance to Darby's predecessor in title by a 1949 deed ("Bell and Davis Deed," R. pp. 233-234) and referenced in a 1949 plat ("Taw Caw Plat," R. p. 287) and that the deed and plat established that the Darby Property consisted of 3.8± acres. It further asserted that the remaining 22 acres now claimed by Darby is owned and has been owned by SCPSA since 1941 when it acquired it as a part of the Santee Cooper Hydro-electric Project.

The matter was referred by consent to the Honorable Thomas W. Cooper, Jr., as Special Referee, with authority to enter final judgment pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, on May 14, 2010. A non-jury trial was conducted on August 4, 2010 with regard to the issue of the boundaries of the Darby Property depicted in Exhibit A of

Plaintiff's Complaint. The Parties stipulated that the access issue would be held in abeyance. Darby presented three witnesses who provided testimony on direct and cross-examination. The parties also entered into evidence numerous exhibits, including the deeds and plats associated with the original conveyance of the Darby Property by SCPSA to Darby's predecessor in title, all subsequent interim conveyances and the conveyance to Darby by his uncle in 2007.

The Court entered a Final Order (R. p. 3) on October 14, 2010, finding that Darby had failed to meet his burden of proof and ruling, in essence, that the Darby Property has the boundaries as described in the 1949 Bell and Davis Deed and the referenced Taw Caw Plat and consists of 3.8± acres. The Court further ruled that the correct legal description of the Darby Property is set forth in the Taw Caw Plat and that the Elliot Plat was incorrect and did not accurately reflect the boundaries of the Darby Property. Additionally, the Court determined that Darby could not rely upon the placement of the "100 foot line inland of the normal high water line" shown in various locations on various documents to determine the boundaries of the tract in question, because the Taw Caw Plat referenced in the Bell and Davis Deed limited the size of the Property to 3.8± acres and clearly demonstrated SCPSA's intent with regard to the original conveyance of the Darby Property.

On October 28, 2010, Darby filed a Motion to Reconsider, Modify and Amend Judgment. On January 25, 2011, the Court issued an Order denying the Motion to Alter or Amend and noting that a property line should now be established by duplicating the lines shown on the 1949 Taw Caw Plat (R. p. 1). Darby commenced this appeal on February 2, 2011.

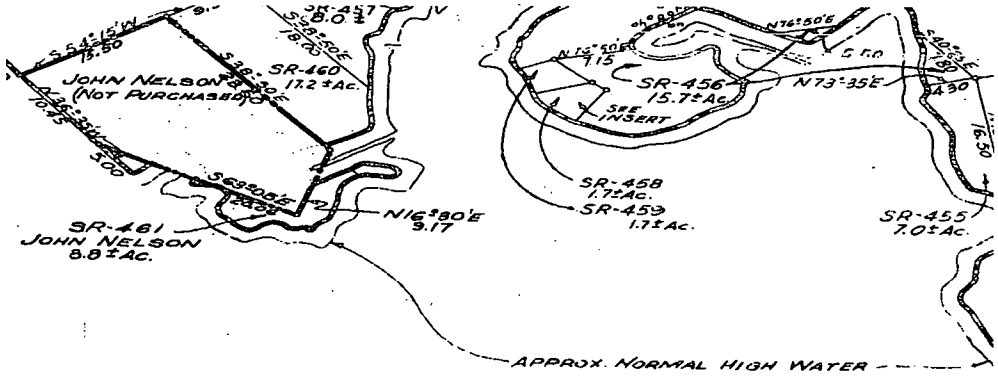
STATEMENT OF FACTS

On June 27, 2007, Darby acquired a parcel of property, (the Darby Property), located in Clarendon County from his predecessor in title by means of a deed which stated on its face a conveyance of "4.0 acres more or less", (the Darby Deed – R. pp. 226-229), and which contained as its sole reference Clarendon County Tax Map Parcel 072-00-00-02 (R. p. 285), which contains 4.0 acres. In September of 2007, after the Darby Property had been conveyed to Darby, he had the Elliot Survey performed which alleged the property actually contained over 26 acres (R. p. 298).

In conjunction with the creation of the Pinopolis and Santee Reservoirs in the 1930s (now respectively Lakes Moultrie and Marion), SCPSA acquired thousands of acres of low-lying swamp land in Berkeley, Clarendon, and Orangeburg Counties. Among these acquisitions was a 28.2 acre parcel purchased from Willie Nelson, Rhetus Nelson, Johnnie Nelson and Cornelia Nelson. The deed (R. p. 230-232) issued by the Clerk of Court for Clarendon County refers to the boundaries, metes, courses and distances as delineated and shown on a plat, reciting the following statement: "Said tract of land is particularly described as Tract No. SR-461 on Land Map No. 35.5 prepared by Harza Engineering Company for South Carolina Public Service Authority, showing the lands to be used by said Authority in its Santee Reservoir." (R. p. 230, p. 286).

Upon completion of the reservoirs, SCPSA sold off parcels it determined were not required for the hydro-electric and navigation project. Included in these conveyances was a large transfer to W. B. Davis, Jr. and Ralph Bell, Jr., which totaled 2,141.1 acres. All of this acreage was conveyed pursuant to a single deed, dated November 18, 1949, from SCPSA to Messrs Davis and Bell, which is recorded in the Office of the Register of Deeds for Clarendon County in Book C-14 at Page 21 (Bell and Davis Deed – R. pp. 230-234). While the Bell and Davis Deed conveyed a total of 2,141.1 acres, the large acreage conveyed was composed of a number of smaller discrete and distinct parcels, including a 3.8± acre tract formerly owned by John Nelson. The Bell and Davis Deed is the deed recited in Paragraph 3 of Darby's Complaint (R. p. 15) as the instrument conveying the Darby Property from SCPSA to Darby's predecessor in title. The Bell and Davis deed references a plat entitled "Map of Lands Taw Caw Creek Peninsula," (Taw Caw Plat, R. p. 287) which is a tracing of the earlier plat prepared by the Harza Engineering

Company. (R. pp. 288-289). Parcel SR-461, the parcel at issue, was shown on the referenced conveyance plat as follows:



The "Map of Lands of Taw Caw Creek Peninsula" references SR-461 as "3.8 acres ±" both as an identifier on the property configuration and in the tabulation (R. p. 287). As shown on the plat excerpt above, the boundary of the 3.8± acres designated as SR-461 is denoted by a "heavy line" (See Testimony of Edward DuRant, R. pp. 186-187).

Messrs Bell and Davis eventually partitioned the 2,141 acres by a deed dated March 23, 1956, (R. pp. 235- 236) which also incorporated a plat by reference. Mr. Davis received 1,047 acres, including the 3.8± acre parcel designated as SR-461, shown on the partition plat, which is recorded in the Office of the Register of Deeds for Clarendon County in Plat Book 14 at Page 225 (R. p. 301).

The subject property passed by way of testate succession and Deed of Distribution dated July 17th, 2000 to Mr. Davis's heirs (R. pp. 237-242), which references a 4 acre parcel of property with a TMS number identical to the reference in the Darby Deed (R. pp. 226-229) (See Schedule A, Number 8, on Deed of Distribution, R. p. 239). Mr. Davis's heirs eventually deeded the property to Robert Hepburn Davis by Deed dated August 30, 2002 (R. pp. 243-247). This deed, by the direct predecessor in title to Darby, uses the identical property description as that contained in Darby's Deed (R. pp. 226-229) and describes the property to be conveyed as a parcel which contains "4 acres more or less" and references a TMS Parcel which contains 4

acres.[1]

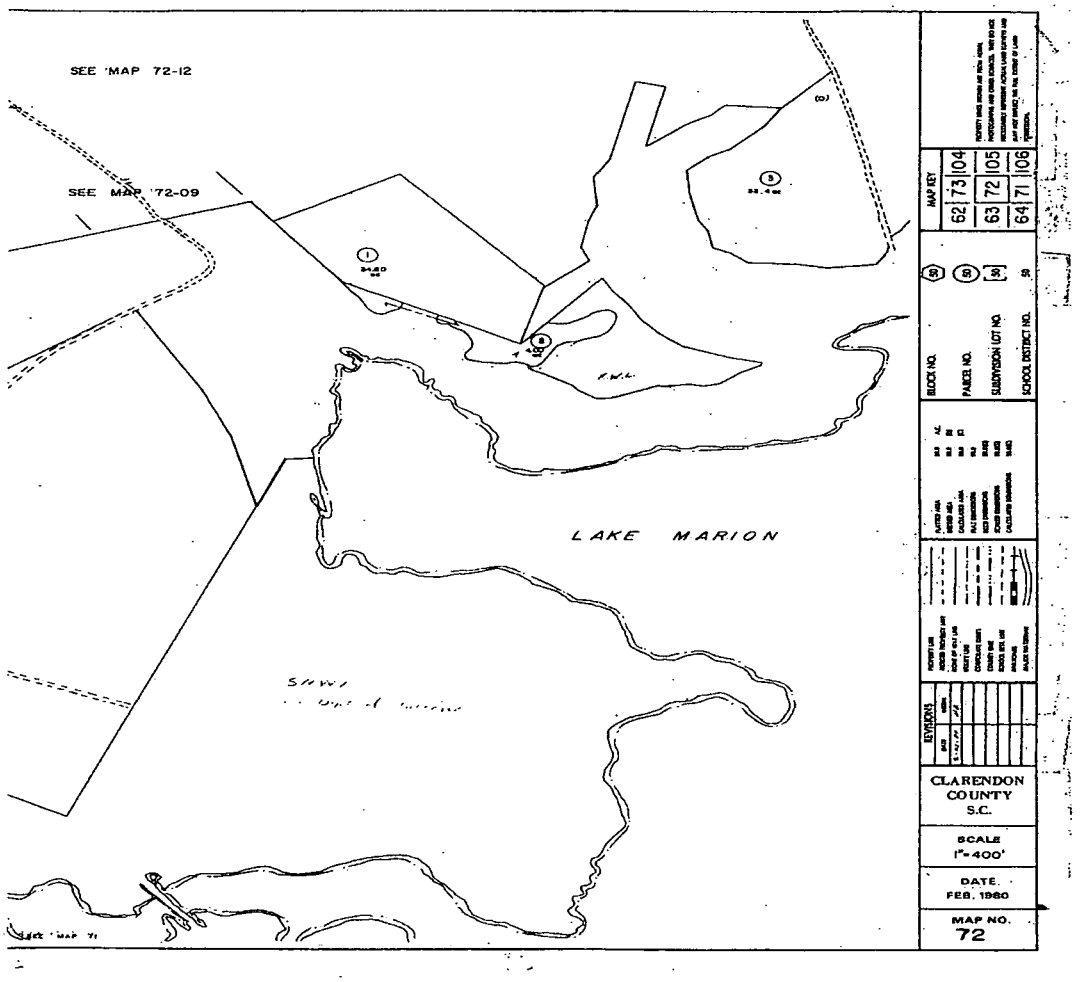
Robert Hepburn Davis deeded the property to Daniel M. Darby and Robin Christina Darby by deed dated June 29th, 2007 (R. pp. 226-229). The Darby Deed contains the following legal description:

> All that certain piece, parcel or lot of land, with improvements thereon, if any, situate, lying and being near the waters of Lake Marion in School District # 10, County of Clarendon, State of South Carolina, containing **4.0 acres**[2], more or less, and being more particularly shown and delineated as Tax Map Parcel No. 072-00-00-002, on the 2002 Clarendon County Tax Map (shown thereon as being comprised of two separate parcels) and having such approximate shape and boundaries as is shown on said tax map above referred to which is hereby craved. This property is shown on the maps for Clarendon County as **tax map parcel # 072-00-00-002.**[3]

The consideration for the conveyance is stated to be $12,000.00.

[1] Darby is the nephew of Robert Hepburn Davis, who is the son of W. B. Davis, Jr., the original grantee from SCPSA (R. p. 72, lines 8-22).
[2] Emphasis in the original
[3] Emphasis in the original

Tax parcel #072-00-00-002 (R. p. 285) is configured on the Clarendon County Tax Maps as shown:



The real property records for Clarendon County designate Tax Parcel # 072-00-00-002 as being comprised of 4.0 acres. The immediately adjacent parcel, which is part of the additional property claimed by Darby, has been consistently designated on several iterations of the Clarendon County tax maps with the annotation "FWS" ("U.S. Fish and Wildlife Service") (See R. p. 285). In addition this adjacent parcel, a portion of which Darby claims, has never been assigned a tax map number.[4] SCPSA has leased the adjacent property which Darby claims to U.S. Fish and Wildlife Service since 1941. (R. p. 248).

[4] It is common practice for lands owned by Santee Cooper not to have an assigned tax map number since there is no taxation of state owned parcels.

On July 14, 2008, Darby filed suit against SCPSA seeking a declaratory judgment that the deed by which SCPSA conveyed property to Darby's predecessor in title in 1949 was actually intended to convey 26.46 acres rather than 4.0 acres more or less. The basis for the claim was a survey that Darby had performed by Duvalle Elliott in September of 2007 (R. p. 298), 2 months after Darby purchased the property, and which was based upon an aerial map (often referred to as a "C" map) obtained by SCPSA in 1977 in connection with its FERC license (R. p. 302).

Darby presented three witnesses at trial. The first, Robert Eppinette, is a soil scientist. The crux of his testimony for Darby was that the elevation of the property had remained unchanged during the time period from the original transaction involving the Darby Property until Darby's acquisition. Upon cross examination, Mr. Eppinette admitted that he had not done a topographic study of the property, had not made any measurements of the lake levels and was unable to determine property lines based upon the study of the soil at the property. (R. p. 70, line 14 – p. 71, line 5). He offered no testimony regarding the specific location of any boundary lines or elevation contour lines, nor did he offer any testimony about the accuracy of the Taw Caw Plat (R. p. 287) or the "C" Maps (R. p. 302).

Darby also testified at trial. He readily admitted that when he purchased the Darby Property he thought he was buying 4 acres (R. p. 90, lines 7-9, R. p. 91, lines 1-4), that the property description on the deed referenced a 4 acre parcel, and that he had been paying taxes on a 4 acre parcel since he purchased the Property. (R. p. 92, lines 3-15). Darby testified that he did not have a title search done on the Darby Property before he purchased it and that he did not have the Elliott survey performed until after he purchased the property. (R. p. 91, lines 10-15). He further admitted that he had no knowledge with regard to the original transaction between SCPSA and Darby's predecessor in title, which occurred prior to his birth. (R. p. 90, lines 15-21). Despite these admissions, Darby stated that he was seeking to add 22 acres to the parcel he purchased. (R. p. 91, lines 7-9).

Finally, Duvalle Elliott testified for Darby. He is a land surveyor who does most of his work in the Clarendon County area and who was hired by Darby to do a survey of the Property after he purchased it. (R. p. 98, lines 6-22). Mr. Elliott described the survey as a "routine survey" (R. p. 99, lines 1-3). However, instead of basing his survey upon prior recorded plats and records found in the RMC office, he located property corners for this survey based upon an

unrecorded "C" Map which "as far as [he] knew" showed the property lines (R. p. 101, lines 17-19) (see also R. p. 118, line 1 – p. 119, line 23). He noted that the "C" map "was the only evidence available, and so basically I just assumed what they had done was correct"...and "just basically re-measured what they had done" (R. p. 103, lines 17-25). He also admitted that the "C" Map, the very document upon which he solely based his survey, showed that only a 4 acre parcel described in the Darby Deed was owned by Darby's immediate predecessor in title and that the additional 22 acres he delineated on his survey was shown to be owned by the United States Fish and Wildlife Service (R. p. 129, line 21 – p. 130, line 24). Yet he testified that his survey represented the true property line for the property (R. p. 111, lines 4-7).

Upon further examination Mr. Elliott testified that the deed transferring the Darby Property to Darby stated on its face that it was granting "4 acres more or less", that to a surveyor "4 acres more or less" meant somewhere between 3 and 5 acres and that he would not expect a deed transferring 4 acres more or less to be conveying 26 acres. (R. p. 113, lines 1-13). He further testified that the purchase price on the face of the deed, $12,000.00, was much more likely a price for a 4 acre parcel than a 26 acre parcel. (R. p. 120, lines 5-10).

With regard to preparation of his survey, Mr. Elliott admitted that he had not reviewed the Taw Caw Plat (R. p. 287) prior to preparing the survey and that it was something he could have used in preparing the survey. (R. pp. 114-115). Upon review of the Taw Caw Plat at trial, Mr. Elliott confirmed that it was the plat referenced in the Bell and Elliott Deed, and that it, and every subsequent deed and plat in Darby's chain of title (R. pp. 233-234, p. 287, pp. 237-242, pp. 243-244, pp. 226-229) and the tax map (R. p. 285), referenced the Darby Property as a 3.8± acre or 4 acre parcel. (R. pp. 122, line 3 – p. 127, line 24).

He also testified that the Taw Caw Plat showed property lines being 100 feet from the high water mark, but that he did not know where the high water mark was in 1949 when the plat was prepared (R. p. 123, lines 12-13). He could not have used this high water mark in his survey work since he did not have the Taw Caw Plat at the time he did the work. Mr. Elliott had also testified previously, in the trial of Bell v. South Carolina Public Service Authority, that he doubted very seriously if the 75 foot contour as of 1949 would be the same as it was in 1979. (R. pp. 283-284). He concluded by testifying that the only document in evidence which designated Darby's property as being 26 acres was the survey that he performed in September of 2007 (R. p. 298, p. 139, lines 3-7).

Neither Mr. Elliott, nor any other witnesses, provided any testimony that the survey Darby relies upon in his Complaint and asks the court to rely upon as the basis for granting him an additional 22 acres, was based in any way upon any contour or boundary lines that were in existence in 1949. Rather his survey is based upon contour lines from an unrecorded document created decades after the transaction between SCPSA and Darby's predecessor in title.

ARGUMENTS

As a preliminary matter, SCPSA acknowledges that the Appellant is entitled to define the Issues on Appeal as he sees fit. However, once defined, he is bound by this designation. "Ordinarily, no point will be considered that is not set forth in the statement of issues on appeal." Rule 208(b)(1)(B), SCACR. See also State v. Black, 319 S.C. 515, 462 S.E.2d 311(S.C. Ct. App. 1995), holding that under the SCACR, an issue is not preserved when not set forth in the statement of the issues on appeal. Appellant's brief sets forth three Issues on Appeal and his brief appears to tangentially address portions thereof; however, the seminal question before this Court is whether the trial court correctly ruled that the boundaries of the Darby Property are as set forth in the Taw Caw Plat.

1. THE STANDARD OF REVIEW ON APPEAL REQUIRES AFFIRMING THE DECISION OF THE TRIAL COURT

Darby's Appellate Brief requests "that this court reverse the trial order and direct entry of judgment declaring the boundary line to be located with reference to the 76.8 foot contour line located on the C map and confirmed by the Elliott and McLeod[5] plats." (Initial Brief of Appellant, p. 17). In order for the Court to reverse the lower court it must find that the lower court's findings of fact were without evidence to reasonably support them. Wigfall v. Fobbs, 259 S.C. 59, 367 S.E. 2d 156. As this Court has noted specifically,

> "A boundary dispute is an action at law. [cites omitted] In an action at law, on appeal of a case tried without a jury, the findings of fact of a judge will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. [cites omitted] That the parties referred the case to a special referee does not change the scope of review, when, as here, the referee enters final judgment."
>
> Bodiford v. Spanish Oaks Farms, Inc., 317 S.C. 539 at 544, 455 S.E. 2d 194 at 197 (S.C. Ct. App. 1995).

As set forth in the Counter-Statement of Facts, there is overwhelming evidentiary support for the lower court's finding that the Darby Property consisted of 4 acres more or less, that the

[5] Darby's reliance on the McLeod Plat (R. p. 296) as any evidence supporting his position seems misplaced. The McLeod Plat, prepared for Santee Cooper's lessee, the United States Fish and Wildlife Service, on December 2, 2008, after the commencement of this lawsuit, clearly identifies the additional property as disputed based upon the Elliott Plat. Further, Darby testified that because of the lawsuit Mr. McLeod declared the property to be disputed and took no further action until the issue was resolved (R. p. 95, lines 12-16). Therefore, the McLeod Plat provides no evidence of Darby's ownership of the disputed property.

boundaries of the Darby Property were as described in the 1949 Bell and Davis Deed and Taw Caw Plat, and that the Elliott Plat, which was based upon a 1979 "C" map was incorrect and did not accurately reflect the boundaries of the property. The court's findings were based upon review of over 50 years of consistent deed descriptions and plat references for the Darby Property, and the admissions of Darby and Mr. Elliott regarding the property acquisition and survey. As admitted by Mr. Elliott on the stand, the only evidence in the record which supported the claim that the property totaled 26.4 acres as opposed to 4 acres was his survey, which was based upon an unrecorded internal map that was not suitable as a conveyance plat and which did not exist at the time of the original conveyance. (R. p. 131, lines 10-15, p. 138, lines 14-21). Clearly the lower court's decision was supported by reasonable evidence and should not be overturned.

2. THE TRIAL COURT CORRECTLY RULED THAT THE APPELLANT HAS FAILED TO SATISFY HIS BURDEN OF PROOF.

SCPSA is an agency of the State of South Carolina. As the Court noted in its Final Order,

> The Plaintiff has failed to satisfy his burden of proof. The Plaintiff obviously has the burden of proof, in this case as in any case, by the greater weight of the evidence. Additionally, because the Defendant is a state agency, the case of State of South Carolina v. Fain, 273 SC 748, 259 SE2d 606 stands for the proposition that the State comes into Court with presumption of title, and if the individual is to prevail, he must recover on the strength of his own title. Therefore, a grant or deed by the government to an individual is construed most strongly against the individual and in favor of the Government.
>
> Final Order (R. p. 7), citing State v. Fain, 273 S.C. 748, 259 S.E.2d 606 (1979).

Pursuant to Fain, SCPSA has the presumption of title to the disputed property. In order for Darby to prevail, he must recover on the strength of his own title. However, rather than there being any strong evidence to support his claims to title, the overwhelming weight of the evidence is in favor of SCPSA's ownership of the disputed property. As noted in the Counter-Statement of Facts, and in Section 1 of the Argument above, all of the documentary evidence and testimony, with the sole exception of the Elliott Plat commissioned by Darby after he bought the property, shows that the Darby Property consists of 4 acres with the boundaries as set forth in the

Bell and Davis Deed and the Taw Caw Plat. Also compelling is that Darby's own deed states that he purchased 4 acres "more or less" and that he admitted at trial that at the time of the purchase he believed he was purchasing only 4 acres. As Judge Cooper noted in his Denial of Darby's Motion to Reconsider, "This rationale was not based upon the 'whim of the fact finder', but on the clear and unmistakable statement of a conveyance of 3.8 acres or 4 acres, more or less, in each conveyance of the chain of title." (R. p. 1). The Court correctly ruled that Mr. Darby failed to meet his burden of proof. Therefore, this Court should affirm the lower court's determination that Darby failed to meet his burden of proof in the lower court, and dismiss his appeal.

3. THE TRIAL COURT CORRECTLY RULED THAT THE DEED INTO PLAINTIFF'S PREDECESSOR IN TITLE CONVEYED FOUR (4) ACRES, MORE OR LESS.

The Final Order provides both a legal and factual basis for the conclusion that Darby purchased only 4 acres. As stated above, SCPSA submitted voluminous documentary evidence providing a historical chain of 3.8± or 4 acres. In particular, SCPSA submitted evidence which showed clearly that the Darby Property had been specifically located, surveyed and designated on a plat as containing 3.8 ± acres at the time of the original transaction in 1949. This specific location, survey and designation of the Darby Property was a distinct act of identification as opposed to the more general designation of contours or high water lines. As the lower court noted in its Final Order:

> The deed from Santee Cooper to the Plaintiff's predecessors-in-title ("the Davis and Bell Deed"), dated November 18, 1949 and recorded in Book C-14 at page 21 in the Office of the Register of Deeds for Clarendon County, contains the following recitation regarding the location of the property:
>
> > "tracts nos....SR-461....located above the one hundred (100) foot strip of land shown on the map hereafter referred to as lying between the lands herein conveyed and the approximate normal high waterline of the Authority's Lake Marion Reservoir, said tracts being more specifically shown and designated on a plat prepared by the Engineering Department of the Authority, entitled "Map of Lands of Taw Caw Creek Peninsula", which plat is designated as Drawing No. 4200-A10 (Index A-1306) a print of which is attached here and made a part hereof."
>
> Drawing No. 4200-A10 referenced in the above deed is a plat prepared by Santee Cooper and dated September 27, 1949. It is attached hereto and incorporated by reference. The Plat conveys multiple parcels totaling 2,141.1 acres, and identifies

separate parcels with their respective acreage. Most significantly, the Plaintiff's parcel is shown thereon as SR-461 and is denoted to contain "3.8± Ac.". Further, the tabulation table located on the face of the plat states that SR-461 is comprised of 3.8± acres. Drawing No. 4200-A10 also shows the location of the "Approximate Normal High Water Line".

(R. p. 5)

The lower court correctly ruled that Darby was bound by the plat description set forth in the Taw Caw Plat, noting "South Carolina Courts have consistently held that 'when maps, plats or field notes are referenced in the grant or conveyance, they are incorporated into the instrument, bind the grantor and his successors and are usually held to furnish the true description of the boundaries of the land." (R. pp. 7-8), and citing, South Carolina Code Section 30-5-250, Carter, South Carolina Boundary Compendium (2d ed. 2003); Holly Hill Lumber Co. v. Grooms, 198 S.C. 118, 16, S.E. 2d 816, (1941); Hammond v. Lindsay, 277, S.C. 182, 284 S.E. 2d 581 (1981); Hobony Club v. McEachern, 272 S.C. 392, 252 S.E. 2d 133 (1979).

The only document admitted into evidence by either party which indicates that the Darby Property consists of 26.64 acres was prepared by the surveyor retained by Darby to perform a post-closing survey. The surveyor's own testimony, wherein he admitted almost exclusive reliance on the "C" map (R. p. 302), calls into question the validity of his map as a legal survey. Instead of basing his survey upon the numerous prior recorded plats and records found in the RMC office (R. pp. 226-229, p. 285, p. 230, p. 286, p. 287, p. 288, pp. 235-236, p. 301, pp. 237-242), he located property corners for this survey based upon an unrecorded "C" Map which "as far as [he] knew" showed the property lines (R. p. 101, lines 17-19) (see also R. pp. 118-119). He noted (incorrectly since there were numerous other plats which were public records and available for his review) that the "C" map "was the only evidence available, and so basically I just assumed what they had done was correct"...and "just basically re-measured what they had done." (R. p. 103, lines 17-19). He also admitted that the "C" Map, the very document upon which he solely based his survey, showed that only a 4 acre parcel described in the Darby Deed was owned by Darby's immediate predecessor in title and that the additional 22 acres he delineated on his survey was shown to be owned by the United States Fish and Wildlife Service (R. p. 129, line 15 – p. 130, line 24). Yet he testified that his survey represented the true property line for the property (R. p. 111, lines 4-7).

The Standards of Practice Manual for Surveying in South Carolina, effective June 26, 2009, which restates Chapter 49, Article 4 of the South Carolina Code of Regulations, contains the following provision:

> "Maps prepared partially or entirely from reference or source data, such as compiled maps, do not represent land surveys as defined herein, and shall be clearly marked accordingly. Compiled maps must have a prominently displayed statement that the said document does not represent a land survey and is unsuitable for deeding of property or recordation."

Further, as stated in *Corpus Juris Secundum*:

> "The essential rule governing resurvey is to follow the steps of the first surveyor, and, a resurvey not shown to have been based upon the original survey is inconclusive in determining boundaries. A precisely accurate resurvey cannot defeat ownership rights flowing from the original grant and the boundaries originally marked off."

11 CJS Boundaries § 124.

A learned treatise on the subject provides that:

> "The purpose of resurveys is to relocate the lines described in an existing conveyance. How this shall be done is a question of interpretation of the meaning of a conveyance. Courts interpret documents. Although the legislature may regulate how a conveyance shall be formed, once it is formed, the courts interpret, in light of the laws existing as of the date of the deed, where the location shall be. All surveys based on the record are of this nature; the courts interpret their meaning and location."

> Evidence and Procedures for Boundary Location, 3rd Edition, Brown, et al., p. 3044, (John Wiley and Sons, Inc.) 1994.

The Elliott Survey upon which Darby asks this court to rely falls woefully short of meeting these surveying standards and the lower court properly ruled that it was incorrect.

Darby has attempted to color the original conveyance as one of 2,100 acres, thereby making his claim for six times the acreage shown on the face of his deed, appear to be "less than 2% of the total acreage conveyed". (Initial Brief of Appellant, p. 12). While this misconstruction may reflect the post-closing plans of Darby, it neglects the overwhelming volume of documentary evidence introduced, commencing with the acquisition deed and plat, and progressing through from the deed out of SCPSA into Darby's predecessors, all the way through to the deed into Darby in 2007, all of which specifically call out acreages to the tenths or

hundredths, and more importantly reference this particular parcel (SR-461) as containing either 3.8± or 4 acres, but never 26.64 acres.

The Court of Appeals should affirm the lower court's decisions that the Darby Property boundaries are as set forth in the Bell and Davis Deed and the Taw Caw Plat and that the boundaries set forth in the Elliott Plat are incorrect.

4. THE TRIAL COURT CORRECTLY RULED THAT THE BOUNDARY LINE SEPARATING THE LITIGANTS' PROPERTY IS ACCURATELY SHOWN ON THE DRAWING REFERENCED IN THE DEED OF CONVEYANCE INTO PLAINTIFF'S PREDECESSOR IN TITLE.

At the conclusion of Darby's brief, he requests that the Court reverse the trial order and direct the entry of judgment declaring the boundary line to be referenced to the 76.8 contour line reflected on the "C" map. (Initial Brief of Appellant, p. 17). However, there is neither factual nor legal support for this position.

As noted above, plat references in recorded deeds control. South Carolina statutory and case law both hold that when maps, plats or field notes are referenced in the grant or conveyance, they are incorporated into the instrument, bind the grantor and his successors and are usually held to furnish the true description of the boundaries of the land. South Carolina Code Section 30-5-250 states that when a deed refers to boundaries, metes, courses, or distances of the property conveyed which are shown on any recorded plat, and when the deed refers to the book and page number of the recorded plat, the boundaries, metes, courses or distances as shown on the plat control. See Blue Ridge Realty Company v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965). Drawing No. 4200-A10, (the "Taw Caw Plat", R. p. 287) referenced in the deed from SCPSA to Darby's grandfather, provides the true location, boundaries, and quantity of land granted by SCPSA to Darby's predecessor in title.

While Darby makes reference to the high water mark in his Statement of Issues on Appeal, the issue is not properly before the Appellate Court. Darby's brief focuses almost entirely on the argument that the boundary must be based on the "actual high water mark rather than an inaccurate graphic representation thereof." This argument fails on multiple fronts, the most basic being that he never introduced evidence regarding natural boundaries or the Rules of Relative Weight of Conflicting Elements at trial. In fact, Darby's surveyor testified that his field survey was based solely on man-made monuments, not natural boundaries. The record is thoroughly developed on this point, by both direct and cross examination:

Q: Tell me what you did to go about trying to find the property lines for Mr. Darby and – and why you came up with the survey that you did.

A: Well, basically I – I got the adjoining plats, what I thought were the adjoining plats which was a C-map and plat of the property of Mr. Martins and just put them together to make a – a closed land survey showing the property lines and the property corners that I found. (R. p. 99, lines 17-24)

***

Q: All right. And once you got the C-map, then what did you do as far as performing the survey.

A: I located the property corners using the C-map and the other adjoining piece of property. (R, p. 102, lines 10-13)

***

Q: -- do you do some independent verification to make sure that that's in the proper location?

A: Well, in this particular case, that [iron pipes] was the only evidence available, and so basically I just assumed that what they had done was correct. (R. p. 103, lines, 15-19)

***

Q: All right. And – and, well, in ---in—well, I guess, further in the way of verification, when you do your survey, and do you use their measurements or you re-measure and you do your own courses or how do you do that?

A: Well, I just basically re-measured what they had done, and... (R. p. 103, lines 20-25)

***

Q: And you didn't have a copy of [the 1949 conveyance plat from Santee Cooper] which is the map...

A: No, ma'am.

Q: ...of Taw Caw. **And the C-map was the sole reference that you used for your survey.**

A: **That's correct.** (emphasis added) (R. p. 138, lines 11-16)

Darby's arguments regarding the Rules of Relative Weight of Conflicting Elements have no bearing since he failed to introduce any evidence at trial regarding this point. "Generally, claims or defenses not presented in the pleadings will not be considered on appeal." See McNeely v. South Carolina Farm Bureau Mut. Ins. Co., 259 S.C. 39, 190 S.E.2d 499 (1972). This rule is consistent with the general restriction that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal. Appellate Practice in South Carolina, Second Edition, Toal, et al., pg. 56. It is well settled that one cannot present and try his case on one theory and then change his theory on appeal. Gurganious v. City of Beaufort, 317 S.C. 481, 454 S.E. 2d 912 (Ct. App. 1995).

Despite failing to present any evidence regarding natural boundaries at trial, Darby still attempted to argue the issue before the lower court. The trial court addressed the issue in its Final Order, relying on the case of Smith v. Durant, 113 S.E. 2d 349, 236 SC 80 (1960), to find that while natural boundaries are traditionally a primary determinant of property description, the rule is not inflexible. The vital question in determining the property conveyed is "the intent of the Grantor at the time the deed is executed." (Final Order of Trial Court, citing Smith v. Durant R. p. 8). It is not reasonable to believe that the intent of the grantor was to grant 26 acres when the clear evidence contained on the Taw Caw Plat was that the intent was to grant a 3.8± parcel.

In the absence of any evidence that the intent of SCPSA was to grant 26 acres to Darby's predecessor in title, Darby relies on conjecture in his brief: "It follows that the quantity **was most likely** estimated by reference to the graphic" (Initial Brief of Appellant, p. 11); "The proceedings in the Bell case **do not suggest** that the quantity of land conveyed was a factor in establishing the boundary." (Initial Brief of Appellant, p. 11); "The **reasonable inference** is the opposite." (Initial Brief of Appellant, p. 11); "**Logic suggests** the existence of a conflict between the competing elements..." (Initial Brief of Appellant, p. 15); "It **would seem** that the evidence necessary to warrant deviation..." (Initial Brief of Appellant, p. 15). (emphasis added).

The Plaintiff's conjecture is defeated by the testimony presented in the Bell trial (R. pp. 183-192, R. pp. 258-284), wherein tangible evidence of the methodology utilized to establish the boundary line was presented. SCPSA does not have to rely on conjecture or speculation to support its position. The evidence, as reviewed by the Special Referee in the Bell action, affirmed by the Circuit Court Judge and the South Carolina Supreme Court, and then reviewed afresh by the trial court in this action, all confirm that the location of the boundary line is as

shown on the Taw Caw Plat referenced in the deed of conveyance from SCPSA to Darby's predecessors in title and not the location set forth in a "C" map which was created decades after the transfer or the Elliott Survey, which was created based not upon determining natural boundaries, but upon reliance on the unrecorded C-Map not in existence at the time of the transfer[6].

Since both parties have relied on the ruling of the South Carolina Supreme Court in the matter of Bell v. South Carolina Public Service Authority, 277 S.C. 556, 291 S.E.2d 196 (1982), this three-decade old law suit warrants close examination. Although Darby argues the Bell action supports his current position, a full review of the testimony and judgment show that his reliance is misplaced. The Bell action clearly confirmed the accuracy of the Taw Caw Plat, the very plat found to be controlling by the lower court in this case.

The Bell action was brought by Darby's grandfather's co-tenant, and was a post-partition action regarding some of the parcels conveyed in the Bell and Davis Deed. The court addressed three principle issues, only one of which is relevant to the current matter, namely:

> (1) The location of the boundary line between the Plaintiff's property and the Defendant's property along Lake Marion which was stated to be 100 feet from the "approximate normal high water line of the Authority's Lake Marion Reservoir." (R. p. 261)

The Bell court took testimony from the draftsman who prepared the Taw Caw Plat, Edward W. DuRant. The transcript of Mr. DuRant's Testimony was introduced as evidence in the current trial (R. pp. 183-189). Mr. DuRant testified that he first started engineering for the WPA, and then went to work as a map draftsman for Harza Engineering in 1938. After returning from military service, he was employed by SCPSA as a draftsman, and in that capacity, he prepared the Taw Caw Plat, which had been introduced as an exhibit in the Bell action as well. (R. p. 185).

Mr. DuRant testified that he prepared the Taw Caw Plat by reference to Harza Land Maps 35 and 36, which he also helped prepare and were based on surveys performed by Harza Engineering. (R. p. 185). He testified that on the Taw Caw Plat the light line exterior of the heavy line is the approximate normal high water line, and the interior heavy line is the hundred

[6] Attention is drawn to the fact that the "C" Map so heavily relied upon by Darby (R. p. 302) was not in existence when the Bell law suit was filed. Despite this fact, Darby doggedly alleges the Bell suit supports his claim for additional acreage.

foot strip boundary. (R. pp. 186-187). This testimony provides full support for the lower court's decision as a review of the Taw Caw Plat shows that the heavy line around SR-461 is distinct and is a clear boundary denoting a 3.8± acre parcel.

The Special Referee in Bell held that "from personally examining the overlay, I found the testimony to be accurate." (R. p. 263).

The Judge's Decree, which adopted the Referee's Report, held:

> "The Referee found that the line in question was located on, and identical with, the 76.8 foot contour above sea level and based his finding, principally, upon the testimony of Edward W. DuRant, Sr., who was employed as a draftsman in 1948, and who prepared the plat attached to the deed. He testified that the line in question was traced directly from the Defendant's Land Maps 35 and 36 which were made by Harza Engineering Company and which were of record in the Clerk's Office in Clarendon County at the time of the giving of the deed from the Defendant to the Plaintiff and Mr. Davis." (R. p. 191)

The Bell court reached precisely the same conclusion as the lower court did in the case at bar, that the boundaries of the property conveyed by the Bell and Davis Deed are as set forth in the Taw Caw Plat.

Mr. Elliott, who provided testimony in the current matter, also testified in the Bell case. His earlier testimony has been introduced as evidence in the current matter. (R. pp. 270-284). On cross-examination during the Bell case, Mr. Elliott stated that he doubted very seriously that the 75' contour as of 1949 was the same as at the time of the Bell trial (R. p. 283-284), thereby undermining his current argument that the contours he relied upon accurately reflected the 1949 boundary of the property.

The Plaintiff's reliance on this case as a basis for collateral estoppel is thoroughly misplaced; in fact, the ruling has the effect of precluding the Plaintiff from asserting his case, as it holds that the property line dividing the parcels is as shown on the very plat which conveyed the property *sub judice*. Darby has mis-applied this earlier ruling, which clearly serves to bar his current claim. Nothing in the earlier ruling indicates that the placement of the property boundaries were incorrect when they were established in the 1940s, and the ruling serves to support the lower court's ruling that the Taw Caw Plat (R. p. 287) is accurate.

Application of the ruling in the Bell case to the facts set forth herein, *i.e.*, that the property boundary is 100' inland from the Approximate Normal High Water Mark, reveals that

the boundaries coincide, and the Taw Caw Plat is accurate. (See R. pp. 290-294, p. 295). There can be no other interpretation.

CONCLUSION

SCPSA respectfully requests that the Court of Appeals affirm the Final Order of the lower court.

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September 29th, 2011
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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Thomas W. Cooper, Retired Circuit Court Judge
Special Referee

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v.

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The undersigned certify that the Final Brief complies with Rule 211(b), SCACR,

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I certify that I have served the Final Brief of Respondent on Appellant, Daniel Darby, by depositing a copy of it in the United States Mail, postage prepaid, on the 29th day of September, 2011, addressed to Thomas E. Player, Jr., Esq., Player & McMillan, LLC, Post Office Drawer 3690, Sumter, South Carolina 29151-3690, Sumter, South Carolina, 29151-3690.

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